



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/04574/2014

THE IMMIGRATION ACTS

Heard at: Field House
On: 26 March 2015

Determination Promulgated
On: 20 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MS GIFTY OKAILEY OKINE
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation

**For the Appellant: Ms A Holmes, Senior Home Office Presenting Officer
For the Respondent: Mr B Owusu, Solicitor, BWF Solicitors**

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the secretary of state and to the respondent as "the claimant." The claimant also brings a counter appeal against the decision of the First-tier Tribunal.
2. The claimant is a national of Ghana, born on 30 November 1961. Her appeal against the decision of the secretary of state refusing her application for the issue of a residence card as the family member of an EEA national exercising Treaty rights was allowed by the First-tier Tribunal Miles under the Immigration (European Economic Area) Regulations 2006 - 'the 2006 Regulations'.

3. On 2 September 2014, Upper Tribunal Judge Rintoul granted the secretary of state permission to appeal against that decision on the basis that it was arguable that, in the light of TA and Others (Kareem explained) Ghana [2014] UKUT 316 (IAC), the First-tier Tribunal Judge had erred in not considering whether the marriage between the appellant and her spouse was valid for the purposes of Belgian law.
4. At the hearing on 10 December 2014, I issued directions that the secretary of state should consider the documentation in the claimant's bundle and any further written report or submissions on her behalf as to whether, as she claimed, her proxy marriage celebrated in Ghana on 13 July 2013 and subsequently registered, was recognised in Belgium.
5. The claimant also gave notice that she too wished to apply for permission out of time against the decision of the First-tier Tribunal for failing to consider in the alternative whether the she and her husband were parties to a durable relationship within the 2006 Regulations.
6. On the 1 December 2014 she was granted permission by Judge Osborne to appeal to the Upper Tribunal. Accordingly, there is the secretary of state's appeal against the decision of the First-tier Tribunal and a counter appeal by the claimant, also against that decision on the basis that he did not consider the alternative claim before him under Regulation 8(5) of the 2006 Regulations.
7. At the hearing Ms Holmes submitted that the claimant had not produced evidence that the proxy marriage celebrated in Ghana on 13 July 2013 and subsequently registered on 22 July 2013, was recognised in Belgium.
8. She submitted in line with the written argument of Mr Tarlow who had represented the secretary of state at the earlier hearing that the information and evidence provided indicated that a proxy marriage conducted in another country is capable of being recognised in Belgium, provided that the relevant conditions have been met.
9. Those are identified in Article 30 of the Code of Private International I13. In order to be produced in Belgium, 'a foreign judgment or authentic instrument has to be legalised in its entirety..... in original or copy. That legalisation is 'done' by a Belgian diplomatic or consular agent who is accredited in the state where the judgement is rendered or where the instrument has been drawn up'.
10. In the absence thereof, the legalisation is done by a diplomatic or consular agent of a foreign state who looks after the Belgian interest in that state; and in the absence thereof by the Minister of Foreign Affairs. It is the King who determines the

specific rules of legalisation.

11. In the decision by the Upper Tribunal in Kareem [2014] UKUT 24 (IAC) it is stated at paragraph 68(g) that it should be assumed that, without independent and reliable evidence about the recognition of the marriage under the laws of the EEA country and/or the country where the marriage took place, the Tribunal is likely to be unable to find that sufficient evidence has been provided to discharge the burden of proof.
12. Mere production of legal materials from the EEA country or country where the marriage took place would be insufficient evidence because they will rarely show how such law is understood or applied in those countries. Mere assertions as to the effect of such laws will, for similar reasons, carry no weight.
13. At the hearing on 10 December 2014, Mr Owusu submitted that the marriage certificate need not be authenticated under Article 30 as it is not "an instrument." However, Ms Holmes submitted that that certificate is a legal instrument which evidences the marriage contract. That submission moreover is given support from the reply from the Belgian Immigration Office contained in the appellant's bundle at I6.
14. That document contains the answers by the Immigration Office relating to the letters served from BWF Solicitors. One of the conditions said to apply is that the foreign act of marriage has to be validated to be presented in Belgium and the Belgian Embassy or the Belgian Consulate or primarily qualified to do so - Article 30 Code International Private Law. It will be investigated if the marriage meets the basic requirements that apply in Ghana and Belgium - Article 46 of the Code.
15. Ms Holmes submitted that a marriage certificate is obviously not a foreign judgment. Accordingly, a marriage certificate, if it is capable of being legalised at all, must come under the class of document being an authentic instrument. This follows logically as certain legal rights such as property ownership, inheritance and the like flow from the concept of marriage as an institution. The translated letter from the Immigration Office refers to a specific instance of a marriage which has been recognised by the Belgian authorities which can be considered binding in Belgium. Recognition requires legalisation.
16. The word "validated" at the second bullet point of I6 is, she submitted, the same for evidential purposes as "legalised" within the meaning of Article 30. It is the specific marriage that has to be validated. Accordingly, the letter at I6 does not contain anything about a general acceptance of proxy marriages and the requirements set out at paragraph 63 of Kareem to the effect that the appellant must furnish evidence to show how the law is applied in Belgium have not been met and satisfied.

17. Proof of the law of another country is by evidence. Such evidence will not only have to identify relevant legal provisions in the other country, but identify how they apply in practice. A lack of evidence of relevant foreign law will normally mean that the party with the burden of proving it will fail.
18. In this case, she submitted that "how they apply in practice" requires the legalisation process under Article 30 to have been completed and complied with. There is no evidence of the marriage certificate having been "legalised" by the Belgian embassy or consulate in Ghana. Accordingly, the document cannot be produced in Belgium under Article 30 of the Code.
19. Mr Owusu submitted that the documentation that was produced is sufficient for the purpose of Kareem. The claimant has accordingly produced adequate evidence relating to the recognition by Belgium of the proxy marriage.
20. In his Rule 24 response to the secretary of state's appeal, he submitted that although the point in Kareem is not conceded, the First-tier Judge should have proceeded to consider whether or not the claimant and her spouse are in a durable relationship.
21. He relied on the authority of MDB and Others (Article 12, 1612/68) Italy [2010] UKUT 161 (IAC) which confirms that in EEA family cases, the Court has a duty to consider all strands of the EEA regulations, even if the first ground fails. He submitted that in this case, the Judge had accepted that there was a marriage and accordingly was obliged to consider whether there was a durable relationship under Regulation 8(2).

Assessment

22. In TA and Others (Kareem explained), supra, it was confirmed that following the decision in Kareem, the determination of whether there is a marital relationship for the purpose of the 2006 Regulations must always be examined in accordance with the laws of the member state from which the union citizen obtains nationality.
23. In the case before me I find that there has been no proper evidence adduced as to whether the marriage between the appellant and her spouse was valid for the purpose of Belgian law.
24. I accordingly find from the lack of relevant evidence produced that the marriage was valid for the purpose of Belgium law, that the First-tier Tribunal made a material error of law in the circumstances. That decision is accordingly set aside.

25. The secretary of state's appeal is accordingly allowed.
26. As already noted, Judge Osborne found that it would be unjust to refuse to admit the application for a counter appeal in the circumstances.
27. In granting permission to appeal, he found that it was arguable that the First-tier Tribunal Judge failed to consider whether the evidence disclosed that there was a "durable relationship" between the appellant and her partner, which may allow the issue of a residence card under Regulation 7(1)(a) of the 2006 Regulations with reference to Regulation 8(5). This would entitle her to obtain the card on the basis of her status as an extended family member as opposed to a spouse if her application were to be successful.
28. Mr Owusu informed me that the alternative - Regulation 8(5) ground - was presented to the First-tier Tribunal by Mr Akaho, the solicitor on behalf of the claimant at that time. He is a member of the same firm of solicitors as Mr Owusu. Mr Owusu informed me that Mr Akaho had expressly submitted that the Judge should consider durable relationship as well as the validity of the proxy marriage.
29. This was in any event referred to and set out in the statements of the appellant and her spouse that had been produced before the First-tier Tribunal. There was accordingly a duty by the Judge to consider that evidence for the purposes of whether or not she was entitled to be issued with a residence card on that alternative basis.
30. Ms Holmes accepted that there had been a failure by the First-tier Tribunal to consider the alternative claim.
31. In the circumstances, I set aside the decision of the First-tier Tribunal on that basis as well. I re-make the decision.
32. As already indicated, I find that the marriage between the appellant and her spouse was not shown to be valid for the purpose of Belgian law.
33. With regard to the alternative claim, Mr Owusu called the claimant and her husband to give evidence. Her husband was outside court when she gave her evidence.
34. Ms Tifty Okele Okine of [], Edgware, attended the hearing and gave evidence. She adopted her witness statement dated 21 May 2014 (paged 1-5). She

arrived in the UK in February 2011 on a visitor's visa. This was to attend her stepfather's funeral.

35. At that time, she was married to a Mr Abbey in Ghana. They had marital problems. She decided to remain here for a while. However, her husband signified the end of their marriage.
36. She subsequently met Mr Ali Adamu Jawando on 11 February 2012. This was at her sister's party. She was attracted to him.
37. They later became acquainted. They exchanged telephone numbers. They then called on each other a few times.
38. They got to know each other well. Mr Ali Jawando was keen on the relationship and persisted. She decided to give the relationship a try. It developed quickly and became sexual as well.
39. He proposed to her in April 2012. In due course, she accepted his proposal, having discussed the matter with her sister.
40. They then made plans for the marriage. Both had Ghanaian parentage and they decided to get married under Ghanaian customary law. They informed their respective families in Ghana.
41. She was finally divorced from her husband in April 2013.
42. On 30 July 2013 the marriage ceremony took place in the presence of the family members in Accra.
43. After the marriage ceremony was performed they started to live together as a couple at the Edgware address and have been living there ever since. At the hearing, the claimant stated during her oral evidence that they have continued to live there as husband and wife up until the date of this hearing and have accordingly been living together for over a year and a half.
44. In cross-examination, she stated that after the marriage ceremony was performed, and they started to live together, Mr. Jawando moved into her apartment. She was living there with her mother as she is her mother's carer " due to her old age."

45. She said that her mother is 81 years old and has mobility issues. She is unable to walk for a lengthy period. She has heart palpitations and once fell over on a bus and is frightened to go out alone.
46. She was asked whether her husband did anything to care for her. He works. He assists her with money. She looks after her mother. Her husband gets on with her mother.
47. She was asked what her husband would find to be the best thing about living with her, the claimant. He has told her that she is a great cook. She, too, has a lot of admiration for him.
48. She was asked what the best thing for her was about living with her husband. She likes the fact that he is not “picky” and helps her.
49. There was no re-examination.
50. Mr Ali Adamu Jawando attended the hearing and gave evidence. He adopted his witness statement signed and dated on 21 May 2014.
51. He was born on 15 June 1978 in Accra. He was granted Belgian nationality in 2004. He relocated to the UK in July 2011. His marriage to his first wife broke down. He then decided to relocate to the UK.
52. He met the claimant at her half sister's party. They got acquainted and commenced a relationship. This has developed quickly and became sexual.
53. He proposed to her in April 2012.
54. In due course they began making plans for their marriage. His evidence in this respect is the same as that given by the claimant, to which I have referred.
55. After the marriage ceremony was performed on 13 July 2013, he moved in with the claimant and her mother at the Edgware address. The claimant is the main carer for her mother. Her mother has been a delight to live with and gives no problems.
56. He stated that the relationship is genuine and subsisting and they have every intention of staying married. Both of them have children from previous

relationships. They provide for their children to the best of their ability. They speak to them on the phone all the time.

57. His wife respects him. They compromise. She is a wonderful cook. He is always anxious to come home after work to enjoy her “wonderful dishes.” She comforts him.
58. He works as a care assistant, earning about £1200 a month.
59. He said that he still lives with his wife at the same address and the relationship is subsisting.
60. In cross-examination, he was asked what he thought of his mother in law living with him. He said she is elderly and wise. She is no trouble at all.
61. She stays with them because his wife is her carer. It was his wife's responsibility.
62. He was asked what it is that she requires care for. She is an old lady who cannot do a lot for herself. She needs help. For example, she cannot go out and get her own shopping. The shops are not close. She cannot walk for very long. She has pain in her legs. She feels stable when the claimant is right next to her.
63. He was asked what the best thing for him was about living with the claimant. He says she is a very good cook. In addition, they have a very respectful relationship and they can resolve matters easily.
64. She likes the fact that he takes care of her and that they have misunderstandings which they resolve.

Submissions

65. Ms Holmes frankly submitted that there was nothing arising out of the cross examination that makes her question the evidence of their relationship. They have been living together for a lengthy period. There is no cause for concern.
66. On behalf of the claimant, Mr Owusu submitted that the quality of their relationship is good. They satisfy the relevant requirements under the 2006 Regulations.

Assessment

67. I found the evidence of the claimant and her husband to be straightforward and credible. In any event, there has been no challenge to the substance of their evidence. They have been carefully cross-examined to establish that theirs is a genuine relationship. I accordingly accept that they are in a genuine relationship and intend to live together as husband and wife permanently.
68. I accordingly find that they have been in a relationship for a lengthy period since they met in February 2012. At the finalisation of his divorce, they set plans to marry in motion. The marriage took place in accordance with customary law in Ghana on 13 July 2013. Since then they have started to live together as a couple.
69. I have had regard to the provisions of Regulation 8 of the 2006 Regulations. One of the requirements is that the claimant must be in a durable relationship with her husband.
70. There is no definition in the 2006 Regulations as to "a durable relationship." Whether or not the claimant is in a durable relationship is a matter to be considered on the basis of the evidence as a whole.
71. I am satisfied from the evidence that the claimant and her husband are in a durable relationship for the purposes of Regulation 8(5).
72. I accordingly find that the claimant is an extended family member for the purpose of the 2006 Regulations.
73. I have also had regard to Regulation 17(4) of the 2006 Regulations. This provides that the secretary of state "may" issue a residence card to an extended family member not falling within Regulation 7(3) who is not an EEA national on application if the relevant EEA national in relation to the extended family member is a qualified person (which the claimant's husband is); and in all the circumstances it appears to the secretary of state appropriate to issue a residence card.
74. Accordingly, Regulation 17(4) provides a discretion to the respondent relating to the issue of a residence card in these circumstances.
75. In the claimant's case, the secretary of state has not considered the exercise of such discretion having dismissed her application.

76. Accordingly, the secretary of state is in the first instance required to consider the exercise of discretion before the Tribunal is itself entitled to consider the exercise of discretion: FD (EEA Discretion – Basis of Appeal) Algeria [2007] UKAIT 49.
77. I accordingly find that the secretary of state's decision was not in accordance with the law.

Notice of Decisions

I allow the appeal of the secretary of state to the extent that I set aside the decision of the First-tier Tribunal. I substitute this decision allowing the appeal of the claimant against the decision of the secretary of state under Regulation 8(5) of the 2006 Regulations to the extent that her application for an EEA Residence card remains outstanding before the secretary of state.

No anonymity direction is made.

Signed

Date: 16/4/2015

Judge C R Mailer

Deputy Upper Tribunal Judge